SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 74

CARL PICCIOLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Carl Piccioli, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on October 29, 1965.

Opinions of the Court Below

The opinion of the Court of Appeals, as yet unreported, is printed in the Appendix to this Petition (P.A. 1a).[1] The opinions in *U.S.A.* v. *Grassia,* Docket No. 29791 in

[1] References are indicated as follows:
References to the numbered pages of petitioner's appendix (P.A. —a).
Reference to the numbered pages of the appendix to Court of Appeals (A. —a).
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the Court of Appeals, *U.S.* v. *Costello, Marchetti* and *Gjanci,* Docket No. 29524 in the Court of Appeals, *U.S.* v. *Costello,* Docket No. 29525 in the Court of Appeals, *U.S.* v. *Marchetti,* Docket No. 29526 in the Court of Appeals, and *U.S.* v. *Gjanci,* Docket No. 29527 in the Court of Appeals, related cases, also are printed in the Appendix (P.A. 28a, 36a, 13a).

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on October 29, 1965. Petitioner's Petition for rehearing was denied on November 26, 1965. This Petition is filed within 30 days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Should *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax laws here involved, be reconsidered by this Court in the light of recent decisions?

2. May petitioner's refusal to answer questions after his arrest upon the advice of his lawyer, be questioned by a judge thereby permitting the jury to draw adverse inferences from his reliance upon his constitutional right to silence and to the advice of counsel?

3. Is one act of passing $2.00 to a special agent in a closed palm, while looking up and down a bar, enough evi-

dence to infer knowledge of the tax laws and thereupon to infer a willful violation of those laws?

4. Assuming, *arguendo*, the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

Statutes, Rules, Constitutional Provisions, and Regulations Involved

68A Stat. 525 (1954), 26 U.S.C. § 4401 (1958): *Imposition of tax*

(a) Wagers—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who con-

ducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U.S.C. § 4411 (1958): *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U.S.C. § 4412 (1958): *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under sub-

chapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 851 (1954), 26 U.S.C. § 7203 (1958): *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

68A Stat. 732 (1954), 26 U.S.C. § 6011 (1958): *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Amend. V, U.S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. VI, U.S. Const.: *Jury Trial for Crimes, and Procedural Rights.*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amend. X, U.S. Const.: *Reserved Powers to States.*

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

26 C.F.R. § 44.4412-1 (B)(2): *Registration.*

> (2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental," each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10

days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see § 44.4905-2.

Statement of the Case

An indictment was returned against petitioner on October 6, 1964 and he was arrested on October 8, 1964 in a massive raid throughout Bridgeport, Connecticut. On October 8, 1964, a press release which had previously been given to newsmen, announced that approximately forty-five persons engaged in various gambling activities were arrested in a spectacular thrust at the extensive gambling activities in this area, by seventy-five special agents aided by fifty State Policemen. Extensive newspaper, radio and television coverage prevailed in Bridgeport and elsewhere in Connecticut. Statements by the Chief Assistant United States Attorney such as the government "had broken the back of gambling" in Bridgeport were reported in the Bridgeport Post.

On November 30, 1964 approximately forty-seven gambling cases were assigned for trial at Bridgeport, and four juries including petitioner's were selected on November 30th and December 1st from the same panel of veniremen. All four cases involved similar substantive charges of gambling tax violations and the same Internal Revenue Agent was the chief government witness in the first three cases. Petitioner's jury was then excused until the trial of Costello, Marchetti, and Gjanci was completed (P.A. 3a). On December 15, 1964, prior to the commencement of trial peti-

tioner moved that his jury which was impaneled on December 1, 1964 be dismissed and a new jury be impaneled or the case be continued because of prejudicial publicity. The motion was denied. (P.A. 3a)

The jury returned a verdict of guilty on both counts of the indictment. Petitioner was sentenced to: Imprisonment for one year on Count 1 and a fine of $5,000. Imposition of sentence was suspended on Count 2 with probation for two years, to start upon date of release from imprisonment. Execution of sentence stayed 24 hours. Petitioner filed motions for judgment of acquittal or new trial. The motion was denied. (A. 7a) On January 12, 1965 petitioner's notice of appeal was filed. (A. 7a) The Second Circuit Court of Appeals affirmed the judgment (P.A. 1a) and petitioner's motion for rehearing was denied.

Statement of Facts

The testimony disclosed that a special agent of the Internal Revenue Service had put wagers in with the petitioner by telephone on numerous occasions and in person on several other occasions. These activities occurred between July 27, 1964 and September 16, 1964. The agent first met petitioner personally on September 3, 1964, and his investigation ended on September 16, 1964. Petitioner was the permittee and part owner of a restaurant-bar known as the Pin-Up Restaurant. It was located in the business area of Bridgeport and was a successful establishment, catering to businessmen, lawyers and police officers.

As a result of the agent's investigation petitioner was arrested in a raid at his restaurant on October 8, 1964 for the alleged gambling tax violations.

During direct-examination, Agent Macolini, in an unresponsive answer, testified as follows: (A. 100a)

* * * * * *

"Q. Thank you very much. Now *after you made your search* of the premises at the Pin-Up Restaurant, what, if anything happened at that point? (Italics ours.)

A. Well, *before we started our search,* I told the defendant's attorney and the defendant I would like to ask him a few personal history questions. (Italics ours.)

Mr. Hanken notified me that he had instructed his client not to answer any questions. And I explained to Mr. Hanken I would need history questions from the defendant, and let him examine my questionnaire sheet.

He allowed the defendant to answer those personal history questions that were on the sheet."

No objection was raised by Petitioner to the answer given by Macolini nor was any reference made to this by either counsel during the remainder of direct, cross, redirect and recross.

After Macolini concluded his testimony and over objection, the trial court proceeded to question Macolini: (A. 105a-107a)

* * * * * *

"(307)

By the Court:

Q. And the second thing I wanted to ask you, Mr. Macolini, after you had executed the arrest warrant, that is, after you had placed Mr. Piccioli under arrest, did you attempt to ask him questions?

Mr. Hanken: I object, your Honor.

By the Court: What I am getting at is this.

If I understood your testimony, you said that you attempted to conduct an interview with the defendant. His attorney, Mr. Hanken, instructed him not to answer questions except that, pursuant to Mr. Hanken's permission, you did ask the defendant certain personal history questions.

(308)

Is that it in a nutshell?

A. Yes, sir.

Q. But the defendant was instructed in your presence

Mr. Hanken: Your Honor—

By the Court:

Q. —by Mr. Hanken, not to answer any questions with respect to whether or not he was accepting horse wagers on the premises?

A. Yes, sir.

Mr. Hanken: Your Honor, I want to object to all these questions and answers.

I think the jury has got an implication that there is no constitutional right here involved.

He had a constitutional right not to answer.

Mr. Moskoff: Excuse me, your Honor—

Mr. Hanken: I asserted that right for him.

These types of questions should not be asked. At this time it is extremely prejudicial.

The Court: I will hear Mr. Moskoff.

Mr. Moskoff: Your Honor, I would request your Honor direct Mr. Hanken, if he is going to argue, that he argue in the absence of the jury; that there is a time for speech making and this is not the time.

(309)

The Court: I will say to the jury this is my responsibility. I think I have some responsibility in presiding, in the conduct of a criminal case.

There were certain questions asked as to the investigation Mr. Macolini conducted, including the asking of questions or the attempting to ask questions of the defendant at the time of the arrest on the premises of the Pin-Up Bar.

I simply wanted to get it clear in my mind, and I assume the jury did also, as to precisely what happened.

And I think Mr. Macolini has made it clear as to what happened as he has responded to my questions.

Now I *will* say to the jury that, once the defendant was placed under arrest, it was his privilege under the Constitution not to answer any questions that might tend to incriminate him under Federal law. I assume that advice was given and, pursuant to that advice of his counsel, the defendant exercised that privilege.

What brought the question on my part was, I was not quite sure what was meant by personal history questions, as distinguished from whatever questions he declined to answer.

(310)

Now if counsel wish to ask any further questions, as a result of the Court's questions, you are at liberty to ask them.

Mr. Hanken: I am afraid not, your Honor. I just wanted the record to note my objection to all your statements and answers thereto. They were extremely prejudicial.

Reasons for Granting the Writ

1. Because this Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953) and *Lewis* v. *United States*, 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court.

2. The Court permitted the jury, by its questioning of a witness, to draw inferences of guilt from petitioner's constitutional right to silence upon arrest and upon his reliance on his right to the advice of counsel, and this fundamental breach of petitioner's constitutional rights warrants review of his wrongful conviction.

3. The decision of the Court below has rendered meaningless the elements of "specific wrongful intent" and "evil motive" required by *Murdock* v. *United States*, 290 U.S. 389 (1933), and *United States* v. *Spies*, 317 U.S. 492 (1943) with regard to Section 7203 offenses.

4. The conscious generation of massive pre-trial publicity by the government combined with the statements of the district court created a situation which only this Court can correct by exercising its power of supervision.

I.

"Are you engaged in the business of accepting wagers on your own account?"

"Do you receive wagers for or on behalf of some other person or persons?"

It is for his failure to answer these and more detailed inquiries contained in Internal Revenue Form 11-C (A. 31a) that petitioner has been subjected to a one year prison sentence and a $5,000.00 fine (A. 11a). As Mr. Justice Black commented in a dissent a decade ago, if a compelled response to these questions

> ". . . would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would." *Lewis* v. *United States, supra,* 348 U.S. at 425.

In rejecting petitioner's contention that the self-incrimination clause of the Fifth Amendment protected petitioner, in the wagering tax context, from having to make any statements save those that "cannot possibly have such tendency to incriminate," *Malloy* v. *Hogan,* 378 U.S. 1, 12 (1964), the court below relied squarely upon *Kahriger* and *Lewis.* While noting, by reference, in its opinion on rehearing that *Albertson* v. *Subversive Activities Control Board, supra,* may lead this Court to overrule *Kahriger* and *Lewis* "insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination," the court felt that the issue was appropriate only for this Court's determination (P.A. 26a).

What petitioner urges is a reappraisal of *Kahriger* and *Lewis* in the light of *Malloy* and *Albertson*.

Significantly, *Kahriger* and *Lewis* were decided without mention of the doctrine this Court firmly established in *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951): that the privilege against self-incrimination "not only extends to answers that would in themselves support a conviction . . . , but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute . . . ," and without reference to the specific information sought by the Internal Revenue Service form involved here. *Malloy* reemphasized the link-in-the-chain principle ignored in *Kahriger* and *Lewis; Albertson* emphasized the questions on the Justice Department registration form, the I.R.S. counterpart of which is involved here and had been ignored in *Kahriger* and *Lewis*.

In *Kahriger* and *Lewis*, the wagering tax statutes were upheld because the Court felt they operated only prospectively and were, therefore, non-compulsory. 345 U.S. at 32, 33; 348 U.S. at 422. But by similar reasoning the *Albertson* registration provisions would have been held valid, since individual Communist Party members could terminate their membership within 30 days after entry of a § 786(a) order directed to the Party, 34 U.S.L. Week at 4014, and thus avoid individual registration. Yet this Court invalidated the registration provisions in *Albertson*, and its comments in so doing are equally applicable to the wagering tax statutes and undermine the rationale of *Kahriger* and *Lewis*:

> "The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party.

> Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act . . . or under § 4(a) of the Subversive Activities Control Act . . . , to mention only two federal criminal statutes. . . . It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause." *Albertson* v. *S.A.C.B., supra,* 34 U.S.L. Week at 4016.

Here, too, the risks of incrimination are obvious. For petitioner to pay the tax required by 26 U.S.C. § 4411, thereby admitting that he was engaged in wagering, he would also be required, by 26 U.S.C. §§ 4412 and 6011, to furnish on I.R.S. Form 11-C the name and address "where each such business is conducted" and the "name and address" of each employee engaged in receiving wagers.[1]

Disclosure in response to these questions, if not an outright admission of violations of some or all of Connecticut's anti-wagering laws, §§ 53-271 to 53-279, 53-295 to 53-297 (Conn. Gen. Stat., 1958 Rev.) or its criminal conspiracy

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[1] These questions and the more detailed inquiries are contained on I.R.S. Form 11-C which is *both* a special tax return and application for registry, which petitioner would have had to complete in order to pay the special tax prescribed by § 4411 and avoid conviction. By virtue of 26 U.S.C. § 6011(a):

> ". . . Every person required to make a return or statement shall include therein the information required by such forms or regulations."

The Commissioner of Internal Revenue refuses to accept receipt of the $50 for the stamp without the information required by Form 11-C. The fact that a defendant tenders payment which is refused is no defense to a subsequent prosecution for accepting wagers without payment of the $50 special tax. *United States* v. *Mungioli,* 233 F.2d 204, 205 (3 Cir. 1956).

statute, § 54-197 (Conn. Gen. Stat., 1958 Rev.),[2] would constitute at the very least a "link in a chain of evidence sufficient to connect" petitioner with such violations. 378 U.S. at 13.

Certainly the listing of employees and agents is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the business of wagering.[3] And disclosure of the place of business in which wagering is carried on could lead authorities to a lease, purchase of real estate, or other rental agreement for the purpose of showing overt acts in furtherance of the conspiracy. *State* v. *McLaughlin,* 132 Conn. 325, 340, 44 A.2d 116, 123 (1945). The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State* v. *Devine,* 149 Conn. 640, 649, 183 A.2d 612, 616 (1962), and need not be criminal acts in themselves. *United States* v. *Rabinowich,* 238 U.S. 78, 86 (1915).

If response to the questions asked in *Malloy,* 378 U.S. at 13-14, involved the *possibility* of self-incrimination, compelled compliance with the statutes here involved would make self-incrimination under Connecticut law a practical *certainty.*

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[2] In *Acklen* v. *State of Tennessee,* 267 S.W.2d 101 (Tenn. 1954), for example, the defendant was convicted of conspiracy to violate a state gambling statute solely on the evidence that he had purchased a tax stamp.

[3] 26 C.F.R. § 44.4412-1(b)(2) requires a person engaging or about to engage in the business of receiving wagers to submit the name of any "employee" or "agent" hired to receive wagers *within 10 days after that* "employee" is so engaged. The "employer," then, is forced to supply the name of someone who will admittedly be in a unique position to bear witness against him. And due to the 10 day delay permitted in the registration of such "employees," the information supplied would relate not only to future criminal act, but also to *past* criminal acts.

To leave *Kahriger* and *Lewis* standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964).

II.

The Court of Appeals in considering the prejudicial effect of the trial court's questioning of Macolini and his comments to the jury, held, *inter alia*, that petitioner's silence, "affords no fair ground for relevant inference," (P.A. 5a) and that the judge's question "was [thus] ill-advised." The court also agreed with petitioner that there was "no apparent reason" for the question, and finally, the error committed was not cured because the trial court's instruction was improper. (P.A. 6a)

Yet in the face of these most compelling reasons for reversal, it was decided that the trial court's error was harmless.

The court believed that since Macolini's answer was not objected to, nothing significant was added to it by the trial court's questioning of Macolini.

Yet in *United States* v. *Lo Biondo*, 135 F.2d 130 (2 Cir. 1943), an almost identical issue was involved. The court reversed the conviction, *although no objection was taken or motion to strike made*—to the admission of the officer's testimony. This same Second Circuit Court of Appeals held that "the requested charge that 'the jury should not consider it an indication of guilt or innocence' was equivalent to a motion to strike" 135 F.2d p. 132.

In the case at bar petitioner objected to the trial court's questions and Macolini's answers. However, directly on the heels of these objections, the court proceeded to charge the jury incorrectly on the law, since petitioner had the right not to answer any questions under any law and not only those *"that might tend to incriminate him under Federal law."* (Italics ours)

Even more serious, and again paralleling *Lo Biondo*, is the fact that after the trial, the trial court once more improperly charged the jury by not cautioning them "that the evidence was to be disregarded and no inference drawn therefrom." (P.A. 6a)

This "proper instruction" (P.A. 6a) was however, specifically included in petitioner's written requests to charge and was conspicuous by its absence.

> ". . . (A. 93, 94a) I charge you that the fact that the Defendant exercised this right must not be considered by you in any way whatever. You must not even refer to it in your deliberations."

The trial court not only erroneously eliminated the crucial rule of law from its charge but reviewed the prejudicial incident again in its summary of the evidence (A. 63a)

> "A failure to charge correctly is not harmless since the verdict might have resulted from the incorrect instruction." The *error is aggravated* by the failure to give the correct charge *upon request.*" (Italics ours)
>
> *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 409 (1946).

Furthermore in the recent and similar case of *U.S.* v. *Fagundes,* 340 F.2d 673 (1 Cir. 1965) it was held that an

arresting officer's testimony as to a defendant's desire not to answer questions and to see his lawyer is admissible, even if objected to, since the testimony would be descriptive of the arrest.

In *Fagundes*, the Government later tried to impeach him after he took the stand, by questioning him as to why he didn't protest his innocence instead of refusing to answer questions and asking to see his lawyer. This *subsequent* questioning by the prosecutor was admitted over specific objection; however, the Appellate Court held this questioning to be improper, and that the Government could not even use this evidence for impeachment.

Furthermore, the Court's conclusion that nothing significant was added to what Macolini had said (P.A. 6a), is to ignore reality.

This testimony was brought out long before the trial court questioned Macolini. There was good chance that the jury didn't comprehend Macolini's remark or paid little attention to it. After all, the trial court's reason for the "ill-advised" question was that he wanted the jury to get clear in its mind and in his own as to precisely what happened. (A. 106a)

Petitioner respectfully submits that it is not the function of a trial court to help a jury determine why a defendant after arrest refuses to answer questions upon advice of counsel.

See *U.S.* v. *Kelly*, 119 F. Supp. 217 (D.C. D.C.).

The question put to Macolini by the Court was an utter distortion of his testimony, since the crucial phrase, "accepting horse race wagers," was never mentioned until the

trial court injected it. The words of the indictment were very likely rekindled in their minds by the question.

To worsen matters, the trial court made petitioner's counsel responsible for this episode in the eyes of the jury.

Lastly, the mere fact the trial court asked Macolini these completely irrelevant questions, using such incriminating phraseology, gives the answers infinitely more importance, than had the prosecutor done so.

> "The influence of the trial judge on the jury is necessarily and properly of great weight, Starr v. United States, 153 U.S. 614, 626, and *jurors are ever watchful of the words that fall from him.*" (Italics ours.)
>
> *Bollenbach* v. *United States,* 326 U.S. 607, 612 (1945).

"The trial judge's ". . . lightest word or intimation is received with deference and may prove controlling."

Starr v. *United States,* 153 U.S. 614, 626 (1893).

Thus, the trial court's treatment of the incident, ran the gamut from distorted, irrelevant and prejudicial comments to failures to charge correctly even after a correct charge was submitted.

Petitioner respectfully submits that "ill-advised" comments by a judge, which were his responsibility, (A. 106a) under all the facts of this case should mean prejudicial and not harmless error was committed, and as in *Lo Biondo,* a reversal of the wrongful conviction.

> "In the second place we think it reversible error to permit a jury to draw any inference adverse to one

accused of crime from his reliance upon his constitutional right to silence and to the advice of counsel. The right to silence on arrest is akin to the right to decline to take the witness stand in one's own defense. Hilton v. United States, 221 F.2d 338, 341-342 (C.A. 5, 1955)". *United States* v. *Fagundes*, 340 F.2d at pp. 666, 667.

III.

The Petitioner was convicted of willfully failing to purchase a $50.00 gambling tax stamp Sec. 4411 and willfully failing to register Sec. 4412 both in violation of Sec. 7203.

Willfullness is the essential element of the crime proscribed by Sec. 7203.

Where the statute simply denounces the doing of an act as criminal, especially in offenses mala prohibita, the law imputes intent; but where a statute denounces as criminal only its "willful" doing, specific wrongful intent, that is, actual knowledge of the existence of the obligation and a wrongful intent to evade it, is of the essence.

The taxpayer must possess an evil motive to defeat the payment of the tax which he knows to be due and mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by evil motive are not probative of willfullness.

United States v. *Murdock*, 290 U. S. 389 (1933);
United States v. *Spies*, 317 U. S. 492 (1943);
Hargrove v. *United States*, 67 F. 2d 820, 823 (5 Cir. 1933);
United States v. *Palermo*, 259 F. 2d 872 (3 Cir. 1958);
United States v. *Martell*, 199 F. 2d 670 (3 Cir. 1952).

It is the petitioner's contention that there was insufficient evidence of such willfullness to support his conviction under Sec. 7203.

The leading case of *Ingram* v. *United States,* 360 U.S. 672 (1959) has often been authority for the proposition, that knowledge of the gambling tax and willful failure to pay it may be inferred from evidence of a defendant's attempts to conceal the operation of a gambling enterprise.

A portion of the evidence supporting the decision in *Ingram* revealed the Defendants to be entrepreneurs of a vast and profitable gambling enterprise and that they had engaged with numerous others to operate a numbers game for three years. The participants used false license plates, took evasive routes to "check-up headquarters", used false names on occasions and attempted to bribe local law enforcement officers. Massive evidence of a gambling operation was uncovered, in addition, one of the Defendants was alleged to have stated that, "business is down to about $3,500.00 per day."

Viewing the evidence presented in the present case in the light of *Ingram,* it is apparent that the government failed in its proof of "willfulness."

In the instant case, there was no direct evidence to show that the petitioner knew of the gambling tax laws. The petitioner took the stand and his testimony revealed that he was a full-time permittee of a legitimate, thriving restaurant-bar business. His other duties included cooking, waiting on tables and cleaning up. His average work-week involved between 80 and 85 hours. The restaurant was located in the downtown business area and professional men, businessmen and policemen formed the bulk of his clientele. (A. 108-9a) As permittee, he was naturally sub-

jected to the rules and regulations of the State Liquor Commission. Special Agent Ripa indicated that at the time he commenced his investigation, petitioner was not suspected of being involved in gambling violations nor was his restaurant suspected of housing such activities. (A. 95-6a) Petitioner, 46 years of age, had worked all his life and had a commendable background. No criminal record, including gambling violations, was introduced against him when he testified. The evidence showed that at least three agents thoroughly and systematically searched the premises for approximately two hours after his arrest. Not a single betting slip, tally sheet or similar paraphernalia was found, and the various sporting publications seized, bore no markings. (A. 99a, 104a)

There was no showing by the government that the gambling tax was ever called to petitioner's attention, even indirectly, by Agent Ripa or anyone else or that gambling stamp requirements had ever been published in local newspapers.

The utter lack of evidence of concealment of a gambling operation, as viewed through *Ingram*, is perhaps best illustrated by the fact that his restaurant was an open, prosperous business and not the typical grocery or cigar store where clandestine gambling operations flourish under a false front.

United States v. *McGonigal*, 214 F. Supp. 621 (1963):

In short, the critical and substantial acts of concealment which have supported the slightest inferences of knowledge and willfullness in all previous gambling tax cases are conspicuously absent in this case.

The government has based its entire case on Agent Ripa's testimony that the petitioner gave him, on one occasion, $2.00 from his pocket with a closed palm (A. 95a), which testimony was partially contradicted by the petitioner. (A. 110a) Presumably, this act is the "evidence of furtiveness" referred to by the Court below. (P.A. 2a) The government thus claims to have established, beyond a reasonable doubt, that by virtue of this isolated, vague and inconclusive act the petitioner knew of the tax and was concealing a gambling operation.

The fact that this act was characterized by the agent to be "secretive" lends no dignity to such utterly indeterminative evidence of guilt. Indeed, the insignificance of this act is perhaps made even more graphic by the neglect of Agent Ripa to even mention it in his report, although numerous other innocuous events were specifically noted. (Ex. 28, A. 119a)

Petitioner respectfully submits that a finding of "willfulness" in this case would read the essence of the crime completely out of the statute and render meaningless the cases which gave this concept truth and vitality.

IV.

The conscious generation of publicity surrounding the events of October 8 is particularly significant because it demonstrates that the government was controlling conduct which the Constitution left to the responsibility of the states.

Although *Kahriger* upheld the constitutionality of these statutes as revenue measures, the Court was not confronted with vivid evidence, as appears in the instant case, of the

use of the statutes by the government and by the trial court as merely an assault on gambling in Connecticut.

In *United States* v. *Calamaro,* 354 U.S. 351, 358 (1957) this Court noted that, "The statute was passed and its constitutionality was upheld, as a revenue measure, and apart from all else in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."

Compared in the light of the foregoing is the remark of the trial court made prior to imposition of sentence upon Costello, Marchetti, Gjanci and Piccioli on January 11, 1965.

> "While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling" (P.A.-6a).

This use by the trial court of improper, misplaced and incorrect, criteria as a basis for sentence was a clear denial of due process of law. *Townsend* v. *Burke,* 334 U.S. 736, 741 (1947).

Later, on February 8, before taking up the criminal calendar, the trial court commented at great length, (A. 17a-27a) (P.A. 7a) about "what has been accomplished by this latest federal crackdown upon gambling and organized crime".

It was Justice Frankfurter's opinion that these statutes were actually "verbal cellophane" which permitted Congress

to "control conduct which the Constitution left to the responsibility of the states". 345 U.S. p. 38.

Petitioner submits that this "verbal cellophane" has been stripped away in the instant case by the fashion in which the statutes were enforced by the government and by the trial court's statements "in the prosecutorial area beyond his function." (P.A. 8a)

Practically every phase of the mass arrests was calculated by the government to and did produce publicity which saturated the state of Connecticut, which the Court below characterized as "needless intensification" (P.A. 27a).

Prior to the commencement of the Marchetti, Costello and Gianci trials (P.A. 9a) counsel for Grassia, *United States* v. *Grassia*, —— F. 2d —— (1965) made the trial court keenly aware of the prejudicial pre-trial publicity which had been generated by the government (P.A. 26a) in his motion for dismissal of the indictment or a continuance. Subsequently, before Costello's trial began, his counsel moved for a mistrial because of prejudicial newspaper publicity, which motion was denied. (P.A. 17a) Later, on December 15, 1964, petitioner's trial commenced before a jury which was impanelled and sworn on December 1, 1964. Realizing that the same trial court was familiar with the pre-trial publicity relating to the events of October 8, 1964 and that the court was not favorably inclined to grant continuances because of such publicity, petitioner based his motion for a new jury panel or a continuance on the prejudicial publicity arising out of the previous trial. This motion was heard and denied on December 15, 1964, prior to the commencement of petitioner's trial. (A. 3a) Actually, under all these circumstances even if petitioner had formally referred to the publicity of October 8 as well as the

adverse publicity attending the Costello trial, it would not have caused the trial court to grant petitioner's request. In all probability, the request would still have been made in vain, and specific reference to the events of October 8, in his motion might, in that light, be deemed to have been unnecessary. See *United States* v. *Viale*, 312 F. 2d 595, 601.

Petitioner was consequently placed in the unique and unenviable position of having his jury impaneled and sworn, read the indictment, and then being released for two weeks, during which time his name was prominently mentioned on the front page in connection with the same activities he was subsequently to be tried for. (A. 116a) The newspapers even published the fact that petitioner had been subpoenaed by the government to testify in the first case (A. 117-118a) although he was never called upon to testify.

The jury in his case, having been selected, knowing his name and the gravamen of the charges against him could not help but be attracted to the detailed newspaper accounts of another gambling tax case, especially those which referred to petitioner. With news dissemination being so sophisticated and all pervading in our society, it is completely unreal to believe that at least one or more of the jurors was not prejudiced against petitioner, by information accrued from the news media or through family or friends.

Accordingly, in view of all the foregoing, petitioner submits that his conviction should be reversed on the basis that the statutes here involved, have been enforced both prosecutorily and judicially so as to control conduct which the Constitution has left to the States in violation of the Fifth and Tenth Amendments, or since there is every indication

that the government was the sole producing agent of the prejudicial publicity, on the basis of this Court's exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law," *Marshall* v. *United States*, 360 U.S. 310, 313 (1959).

CONCLUSION

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

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